

No. 42618-8-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER PAYTON,

Appellant,

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FILED  
COURT OF APPEALS  
DIVISION II  
2012 OCT 12 PM 1:14  
STATE OF WASHINGTON  
BY DEPUTY

ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
PIERCE COUNTY

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The Honorable Vickie L. Hogan, Judge

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APPELLANT'S STATEMENT OF  
ADDITIONAL GROUNDS FOR REVIEW

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Presented by, Reginald Bell  
CHRISTOPHER PAYTON  
Coyote Ridge Correction Center  
Post Office Box 769  
Connell, Washington 99326

I, Christopher Payton, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief.

I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Since I am not an attorney and the issues I have raised herein are Constitutional in nature, and most importantly, this is an appeal as of right, I asked that this court exercise its discretion pursuant to RAP 10.10(f) and request additional briefing from my appointed counsel to address the issues raised herein.

#### **Additional Ground 1**

Trial and appellant counsel rendered ineffective assistance of counsel by failing to challenge the sufficiency of the evidence used to obtain Paytons conviction for first degree assault

Mr. Payton argues that his trial counsel on direct appeal was ineffective for failing to challenge the sufficiency of the evidence. Statev Brown, 55 Wn.App. 738, 780 P.2d 880 (1989) ("defendant moved for dismissal at close of States case and again at close of the evidence") review denied, 114 Wn.2d 1014.

Crr 7.4(a)(3) and his appellant counsel on his direct appeal as of right was ineffective for failing to challenge the sufficiency of the evidence on appeal. State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983); State v. Chavez, 65 Wn.App. 602, 829 P.2d 1118 (1992); State v. Young, 50 Wn.App. 107, 747 P.2d 486 (1987).

In general, to support a claim of ineffective assistance of counsel, a defendant must satisfy a two part standard. First, he must show that counsel's performance was so deficient that it "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668 (1984). Second, a defendant must show that the deficient performance prejudiced the defense so "as to deprive the defendant of a fair trial, a trial whose results is unreliable." Id. at 687.

In the context of failing to raise viable issues on appeal a defendant must show that the appeal would have had, with reasonable probabilitly, a different outcome if the attorney had adequately addressed the issue. see United States v. Dovalina, 262 F.3d 472.

In assessing whether an attorney was ineffective for failing to present an issue, the court looks to see first if the attorney missed a "significant and obvious" issue, if so, the court compares the neglected issue to those actually raised if the ignored issues were clearly stronger than appellate counsel was deficient, to show prejudice, a showing of "reasonable probability" the omitted issue would have altered the outcome of the appeal had it been raised. *Stallings v. United States*, 536 F.3d 624. *Gray v. Greer*, 800 F.2d 644 ("failure to present significant and obvious issue on appeal was ineffective assistance of counsel") *Holsclaw*, 822 F.2d 1041 ("failure to contest the sufficiency of the evidence when the evidence was barely enough, if enough, was outside the range of competent assistance resulting in reasonable probability that, but for error, results would have been different").

At the end of all the evidence, after verdict, or on appeal, a court examines sufficiency based on all the evidence admitted at trial. *Chavez*, 65 Wn.App. at 605; *Young*, 50 Wn.App. at 111. Regardless of when a court is asked to examine the sufficiency of the evidence, it will do so using the best factual

basis then available. Payton maintains the State failed to meet its burden of proving two essential elements of first degree assault<sup>2</sup> and bases this contention on the record evidence as follows;

#### Additional Ground 2

The State did not prove all material facts as required by Winship therefore the evidence was insufficient as a matter of State law violating Paytons Fourteenth Amendment right to the U.S. Const.

The Supreme Court of the United States has repeatedly stated in the broadest terms that no state may not condemn any person for an infamous crime unless it proves beyond a reasonable doubt every fact necessary to establish the essential elements of the crime charged. In re Winship, 397 U.S. 350, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Washington State provides this protection to its citizens. Art I, § 3 and see RCW 9A.04.100. It is critical that our criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. "The reasonable doubt standard is indispensable for it imposes on the trier of fact necessity of reaching a subjective state of certitude on the facts in issue." State v. Hundley, 126 Wn.2d 418, 895 P.2d 403 (quoting) Winship, 397 U.S. at 364;

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<sup>2</sup> "the trial court submitted erroneous instructions to the jury. This issue is addressed in Additional Ground 3"

When evaluating claims of insufficiency of the evidence to support a conviction the question is not whether the court itself believes the evidence establishes guilt, instead the relevant question is "whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 1307, 61 L.Ed.2d 560; State v. Joy, 121 Wn.2d 333, 851 P.2d 654 (1993). The court views the record as a whole in the light most favorable to the prosecution. Gordon v. Duran, 895 F.2d 610 (9th Cir.) cert denied, 489 U.S. 1077 (1996) and the evidence is interpreted most strongly against the defendant. Id (citing) State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977). "A review of the sufficiency of the evidence is undertaken with reference to the elements of the criminal offense as set forth by state law. Jackson, 443 U.S. at 324 N.16

Under Washington State law Payton was charged with first degree assault pursuant to RCW 9A.36.011(1)(c). Under State law a person is guilty of first degree assault if he or she, with the intent to inflict great bodily harm . . . Assaults another and inflicts great bodily. see RCW 9A.36.011(1)(c).

The State had to present sufficient evidence such that the jury could find each of the following four elements of the crime charged beyond a reasonable doubt.

(1) That on or about 31st day of October , 2010 the defendant assaulted Kurama Youkai .

(2) That the assault was committed with a deadly weapon or by force or means likely to produce great bodily harm or death

(3) That the defendant acted with intent to inflict great bodily harm; and

(4) That this act occurred in the State of Washington (Jury Instructions No. 29).

As to the first element the facts and evidence in the record shows Payton assaulted Youkai. 1VRP131; 1VRP140; 2VRP200-201;

As to the second element the facts and evicence in the record shows that Payton used a deadly weapon (hatchet) 1VRP128; 1VRP130; however the State failed to adduce any evidence which shows Payton "acted with intent to inflict great bodily harm."

Under Washington State law, evidence of intent is to be gathered from all the circumstances of the case including, not only the [manner] and [act] of inflicting the wound, but also the nature of prior relationships and any previous threats. see State v. Ferreria, 69 Wn.App. 465, 850 P.2d 541; State v. Wilson, 125 Wn.2d 217;

The facts and evidence in the record shows that Payton never threatened to harm Youkai in any fashion. 1VRP146; 1VRP147; The incident which occurred between Payton and Youkai was instigated because of the incident with Payton and Youkai's mother. 1VRP125-127; therefore this record does not support Payton's objective and purpose was with the intent to inflict great bodily harm on Youkai. see Wilson, 125 Wn.2d at 212. This record supports at best, Payton assault of Youkai was spontaneous and induced after being surprised and tazed by Youkia during the domestic dispute between Payton and Youkai's mother. 1VRP127; 1VRP130; 1VRP131;

Although Youkai's suffered injuries from this incident. 2VRP200; 2VRP201; 3VRP343; 3VRP346-47; these injuries did not rise to a level of great bodily harm. 3VRP362-63; but rather substantial bodily injury as defined by RCW 9A.36.021(1)(a).

Payton contends, as a result of the above facts his trial counsel was deficient for failing to file a motion for aquital asking the trial court to arrest judgment of the jury's first degree assault verdict and find the facts alleged met the elements of second degree assault and his appellate counsel was deficient for failing to raise this issue on his appeal.

### Additional Ground 3

The Court erred when it closed the court without first applying the closure test violating Paytons Constitutional rights under art I, § 22 and the VI Amendment

Mr. Payton claims that the trial court neglected its responsibility to protect his right to a public trial in the face of the courts full closure of the courts instructions to the jury by failing to apply the closure test articulated by the Supreme Court in Boneclub, 76 Wn.App. 872, 888 P.2d 759 (1995).

Here, the record amply reflects the court was closed prior to its instructions to the jury. 6VRP631-32; This record also reflects no closure test was done. Lacking a trial court record showing any consideration of Mr. Payton's public trial right, it cannot be determined whether closure was warranted. As the Supreme Court held in Boneclub, the "trial courts' failure to follow the five-step closure test enunciated in this court's section 10 cases violated Boneclub's right to a public trial under section 22 prjudice is presumed where a violation of the public trial right occurs."

128 Wn.2d at 262. State v. Marsh, 126 Wash. 142, accord Waller, 467 U.S. at 49 & n.9.

#### Additional Ground 4

The evidence introduced at trial to show Payton assaulter Gloria Morris which resulted in Substantial Body Injury as required by Washinton State law was insufficient violating his IVX Amend Right.

Mr. Payton incorporates by reference the authoritative argument in his statement of additional grounds ground 2. He will not repeat all his arguments here, but simply note key points.

The facts and evidence in the record shows that after returning home Gloria Morris received calls and text messages from Payton 2VRP279; asking her to come and pick him up. Ms. Morris told Payton she had already came and stated she was not coming back. 2VRP279; Mr. Morris went to bed. 2VRP281; later that morning Payton returned home and he was angry and banging on the bedroom door. 2VRP283; Payton told Ms. Morris she had 5 seconds to open the door or he was comming through but he never threaten Ms. Morris with any violence. 2VRP284; Ms. Morris called 911. 2VRP285; Than after the 911 called Ms. Morris testified to if she does not open the door he was going to bash to bash some heads in. 2VRP286; Morris open's the door and Payton came in the room. 2VRP286-87; Payton did not raise or threaten Morris with the hatchet. 2VRP292; he smacked her in the mouth with his fist. 2VRP294; 2VRP296-297;

Not one time did Payton strike Morris with the hatchet than her son entered the room 2VRP297; and the defendant started hitting Youkai over and over. 2VRP298 2VRP299-303; the fire department arrived shortly there after and provided medical treatment to Youkai and transported him to the hospital. 2VRP304; Morris sustained any injuries which required treatment. 3VRP 305; she sustained soreness from the punches thrown by Payton. 3VRP305; Mr. Payton did not strangle Morris during this altercation. 3VRP319; <sup>2</sup>

Mr. Payton claims that this record fails to adduce any evidence that Payton assaulted Morris and inflicted substantial bodily injury as defined by RCW 9A.36.021(1)(a) by strangulation or apprehension of fear. at best the record shows Payton committed simple assault in the fourth degree and Paytons trial and appellate counsel was deficient for failing to challenge the sufficiency of the evidence. Holsclaw v. Smith, 822 F.2d 1041.

<sup>2</sup> "the record also sustains that Payton did not strike Morris with the deadly weapon (hatchet) therefore he did not assault Morris with a deadly weapon. --see Instruction No. A--deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used is readily capable of causing death or substantial bodily injury. (Instruction 28) Payton used his fist.

### Additional Ground 5

#### The evidence was insufficient to support first aggressor instruction

Mr. Payton claims that there is no evidence in the record to support the trial courts "first aggressor instruction" and it violates a substantial body of federal law. Payton incorporates herein as reference controlling state and federal authorities governing this claim and ask that the court properly review Gloria Morris and Youkai Morris testimony.

### CONCLUSION

For the reason discussed above the trial courts conviction of first degree assault should be vacated and reduced to second degree assault. The trial courts conviction of second degree assault should be vacated and reduced to fourth degree assault. The trial courts imposition of a weapon enhancement in the matter of Gloria Morris should be vacated. The trial courts first aggressor instruction should be found in err. Finally the trial courts closure of the court should be found a violation of Paytons constitutional rights and ordered reversed and remanded for a new trial. These obvious and significant issues which were not raised by counsel and trial counsel failure to challenge the sufficiency of the evidence should be founded to be ineffective assistance.

DATED this 8th day of October, 2012.


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CHRISTOPHER PAYTON

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the date below  
I served on the respondents attorney of record a true  
and correct copy of the document in which this certificate  
is attached.

DATED this 8 day of October, 2012.

  
CHRISTOPHER PAYTON

IN THE APPELLATE COURT OF THE STATE OF WASHINGTON  
DIVISION 11

State of Washington  
Petitioner

Case No. 42618-8-11

Christopher Payton  
v.  
Defendant

DECLARATION OF MAILING

FILED  
COURT OF APPEALS  
DIVISION II  
2012 OCT 12 PM 3:14  
STATE OF WASHINGTON  
BY DEPUTY

I, Christopher Payton [name], declare that, on 10-9-2012 [date], I deposited the foregoing [list document/s]:

Agreements statement of additional bonds

or a copy thereof, in the internal mail system of

Coyote Ridge Correction Center [name of institution]

and made arrangements for postage, addressed to each of the following:

X Kathleen Proctor - Pierce County Prosecuting Atty  
David C. Bonzoh - The Court of Appeals

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

X DATED at Connell, Washington [city, STATE]

on this 9 day of October, 2012.

X Christopher Payton  
[signature]